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ABSTRACT

This paper gives an overview of the legal environment of advertising as it is influenced by the Supreme Court and by the Federal Trade Commission (FTC) and provides some clues as to what advertisers might expect in that environment in the future. Using a thematic approach to examine the current FTC and judicial system views of advertising as a source of consumer information, the paper then considers the development of the FTC's criteria for regulating unfair and deceptive advertising practices. It underscores the environment of uncertainty within which the advertiser operates, noting that it is an environment in which advertising is extended First Amendment protection and encouraged as an important source of consumer information on the one hand and on the other is subjected to the restraints of prior substantiation and regulation based on the FTC's expertise. (Author/TJ)

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MANAGEMENT CONSIDERATION OF ADVERTISING:

IS IT WORTH THE PRICE?

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Few people would deny that business no longer operates in a caveat emptor environment, and most responsible business persons would not advocate a return to that environment. However, the shift from that position, occurring almost simultaneous to the Supreme Court's changed position regarding protection for commercial speech and the Federal Trade Commission's emphasis on such speech as a means of providing consumer information, has projected business persons into a somewhat alien environment. The mad rush into a caveat vendor structure where lines of acceptable and unacceptable are blurred or non-existent has created a topsey-turvey world where business no longer operates under only the penalty of failure in the marketplace.

Increasingly business persons and their advertisers are being subjected to a special multiple jeopardy with stiff penalties for failure in the marketplace and the legal areas of the regulatory agencies or the courts. At times, the business person experiences a confusing mixture of them all. On a simplified level, this situation can be represented schematically as in Figure I.

Figure I

	Market Success 1	Market Failure 2
Legal Problem 1	F + S	F + F
No Legal Problem 2	S + S	S + F

S = Success
F = Failure

Where:

Cell 11: The business person succeeds in the market but has legal problems.

Cell 12: The business person fails in the market and has legal problems.

Cell 21: The business person succeeds in both the marketplace and the legal arena.

Cell 22: There is legal success but market failure.

Discounting any profit which might be generated in the long-run because of good product or corporate reputation, a business is rewarded for conforming to legal standards only by the absence of legal problems. Thus, although the company may lose profit because of failure in the legal arena, it will not gain profit for success. On the other hand, businesses can logically expect to gain financial rewards for marketplace successes and conversely to suffer losses with marketplace failures. Naturally it would be absurd, based upon Figure I, to conclude that only one-fourth of all promotional marketing efforts will be successful. However, this schematic representation should make business persons and their advertisers aware of the critical importance of considering the legal environment of promotion if they desire unqualified financial success in the marketplace.

It is the purpose of this paper to give an overview of that legal environment primarily as influenced by the Supreme Court and the Federal Trade Commission, and hopefully to provide some clues as to what advertisers might expect in that environment in the future. Make no mistake, although the problem is directed at the business community, because of the unique position of advertising as the "communicator of information," it is advertising which bears the initial responsibility in this new social emphasis. The Commission's view of advertising has been discussed in some key cases and issues addressed by the Commission. Further illustration comes from the courts in those cases which have gone into appeal.

However, comprehension of the Commission's view and the courts evaluations is not facilitated by a strictly chronological examination of the Commission's activities relating to advertising. Rather, a thematic approach of first examining the current Commission and judicial system views of advertising as a source of consumer information and then considering the development of the criteria for determining deception is more revealing.

As early as 1971 there were unofficial indications that the FTC was coming to view advertising as a rich potential source of consumer information that had not been fully developed. In a series of 1971-72 letters and speeches members of the FTC began to call for advertisers to name competitors in their ads rather than resort to the Brand X convention. At the urging of these officials, broadcast media began to accept comparison advertisements. Although this posture was unofficial, it was in general accord with an emerging Commission goal of increased consumer information.

The FTC's drive for this increase in consumer information via advertising was manifested in the 1970s by its involvement in the removal of restrictions on advertising within the professions. To date, the FTC has been involved in the removal of advertising restraints for doctors, lawyers, pharmacists, veterinarians, and opthamologists.

The FTC promulgated a Trade Regulation Rule (TRR) to prohibit state bans on price advertising of prescription drugs[1] before the Virginia State Board of Pharmacy case[2] was decided by the Supreme Court. This in itself may be taken as an indication of the FTC's interest in seeing that commercial information not be restricted in its flow to consumers. Moreover, before Bates v. Arizona State Bar[3] was decided by the Supreme Court, the FTC also had instituted activities to eliminate some of the restrictions on medical advertising. The Commission's original complaint alleged that the Principles of Medical Ethics issued by the Association prevented individual doctors from advertising the types and prices of services they make available to the public. The AMA countered by a request that the FTC reconsider the complaint on the grounds that the AMA had ceased the restraining practices and issued a general guide on advertising and solicitation. However, the FTC denied the AMA's motion on the grounds that, the mere

fact that the offending practices had been discontinued did not provide sufficient assurances that an order was unnecessary and not in the public interest. Thus, the FTC's strong resolve to strike down barriers to the flow of commercial information to consumers was illustrated again.

The FTC also promulgated a TRR which preempts state, local and private controls and enables sellers of opthamic goods and services to advertise prices.[4] One account of FTC action in this area cites a recent FTC report as contending that, "Consumers are being 'significantly injured' by the restraints on price advertising. Price advertising has been restricted to ensure the eyeglass dispensers' economic well-being."[5]

Although more examples certainly exist, there is little use in belaboring the point--the FTC has demonstrated in the 1970s a commitment to breaking down barriers to the flow of commercial information to consumers. The Commission's commitment has been bolstered by the Supreme Court's extension of First Amendment protection to commercial information.

In 1942 the Supreme Court ruled that the First Amendment did not protect 'purely commercial advertising.'[6] Unfortunately, although this case has been cited frequently, it has been discussed rarely. Examination of the case reveals, even then, a Court groping with the inherent contradiction of limited First Amendment application. Pivotal in the determination was the application of a local control ordinance regarding the distribution of handbills on the streets. Having been warned of the ordinance, Chrestensen had in fact included on the handbill a protest against official conduct which he claimed was "proper for public information." Although the Court noted that the "streets are proper places for the exercise of the freedom of communicating information and disseminating opinion", the decision turned on whether the "affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose of

evading the prohibition of the ordinance." The Court found that it was and thus upheld the application of the ordinance. The Court noted that "the Constitution imposes no...restraint on government as respects purely commercial advertising."[7]

The Chrestensen decision through the use of that phrase defined the problem; the Court has been working its way, with the assistance of all lower courts, toward an answer ever since. That the courts were somewhat uncomfortable with the "unprotected, yet protected" aspects of paid messages is obvious in a decision handed in 1963. At that time, the courts extended First Amendment protection to public messages, even though the message may be considered to be in poor or questionable taste.[8]

The Supreme Court in New York Times v. Sullivan may have provided some early indication of judicial shifting in position regarding the entire issue of First Amendment status of advertising. Brennan, writing for the Court noted: "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny... the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, 'commercial advertisement'."[10] He noted that the advertisement in question was not a "commercial" one, but he continued, "(i)t communicated information..."[11]

Advertisements communicating information became the issue is a series of cases which developed over the next decade.[12] In Lee v. Board of Regents the court addressed the issue of whether a campus newspaper open to commercial and "certain other types of advertisements could constitutionally reject...advertisements because of their editorial character."[13] In supporting the District Court, the Circuit Court (7th) disallowed the rejection of advertisements of editorial nature by quoting from Tinker:[14] "undifferentiated fear or apprehension of disturbance is not enough to overcome the

right to freedom of expression."

Yet, First Amendment protection of purely commercial speech" was not extended by the courts until the 1970s. Once actually begun the evolution of First Amendment protection of advertising in the realm of commercial speech for purely commercial reasons was astonishingly rapid. The validity of the commercial speech exception to the First Amendment protection was questioned in Pittsburg Press Co.[15] and terminated with Begelow v. Virginia,[16] Virginia State Board of Pharmacy,[17] and First National Bank of Boston v. Bellotti.[18]

In Bigelow a Virginia newspaper published an advertisement concerning referral services for legal abortions in New York. The newspaper editor's First Amendment claim was rejected by the Virginia Supreme Court holding that the advertisement was commercial and therefore not constitutionally protected. In unusually direct terms the court finally discussed the issue:

...speech is not stripped of First Amendment protection merely because it appears in that form[19] ...The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or solicitations,[20] or because appellant was paid for printing it,[21] or because appellant's motive or the motive of the advertiser may have involved financial gain.[22] The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."[23]

The newspaper editor's First Amendment claim had been rejected by the Virginia Supreme Court holding that the advertisement was commercial and therefore not constitutionally protected. Although the Supreme Court noted

in dicta that "advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest," it must be done by "weighting the First Amendment interest against the governmental interest alledged."[24] The Court continued: "(t)he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[25]

Less than a year later the Court again faced the problem of commercial speech in Virginia State Board of Pharmacy.[26] In striking down the state's statute prohibiting the advertising of prescription drug price information, the Court emphasized that an advertiser or publisher not only has the right to disseminate truthful advertising, but also that the public has a right to receive information necessary to informed decision making.[27] Pivotal in this decision was the merger of two heretofore unrelated First Amendment explanatory patterns. Blackmun accomplished this by providing a history of cases in which the Court had protected "a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"[28] "If there is a right to advertise, there is a reciprocal right to receive the advertising..."[29]

Although the Court had been, for a number of years, working its way toward a firm position regarding protection for commercial speech, each earlier case had an element which allowed the Court to avoid anything more than ad hoc balancing regarding advertising. Even Bigelow with its almost catalog-like listing of positions taken regarding the commercial aspects of communication did not in absolute terms face the problem in definition created in Chrestensen. The Court did not take an evasive route in Virginia Pharmacy: "There can be no question that in past decisions the Court has given some indication that commercial speech in unprotected."[30] The dicta is evidence that the Court had intended Bigelow to solve the problem; when it did not, the decision in this case became a vehicle for

clarification. The special nature of commercial communication or advertising was addressed in detail in the careful, logical, reasoning used to support striking down the state's statute prohibiting the advertising of prescription drug price information.

If the Court merged traditions in emphasizing that an advertiser or publisher not only has the right to disseminate truthful advertising, but also that the public has a right to receive information necessary to informed decision making in the commercial arena, it also allowed room for certain regulation. "Some forms of commercial speech regulation are surely permissible,"[31] such as time, place and manner restrictions.[32] In addition the Court observed that untruthful commercial speech is not protected, that there is "no obstacle to a state's dealing effectively" with deceptive, but not provable false advertising and that the attributes of commercial speech--verifiability, durability and objectivity--may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker than is true in other forms of protected speech.[33] Although "the free flow of commercial information is indispensible,"[34] the state may ensure "that the stream flows cleanly as well as freely."[35]

Carey,[36] decided shortly after Virginia Board of Pharmacy, reinforced and expanded on the constitutional protection of commercial speech. Handed down two weeks prior to Bates, Carey clearly indicated the direction the Court was taking with regard to advertising. At issue was a New York statute dealing with control of contraceptives through a prohibition of sales to those under 16 years of age by anyone other than a pharmacist, and on advertising by anyone in any place regarding contraceptive devices. The District Court's holding of unconstitutionality was sustained in all aspects; however, only the section dealing with advertising is germane.

"A state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity even when that information could be categorized as 'commercial speech.'"[37] The Court further listed the supported areas of state control and found all lacking in the case: the regulation was not "a mere time, place and manner restriction," nor did it "prohibit only misleading or deceptive advertisement(s), nor were the transactions proposed in the forbidden advertisements...illegal in any way."[38]

The Court in Bates[39] continued its examination of areas of state allowed control of advertising, this time by addressing the decision of whether professional advertising for services is entitled to First Amendment protection. In striking down a disciplinary rule of the Arizona Supreme Court prohibiting a lawyer from advertising, the Supreme Court affirmed that professional (legal) service advertisements were entitled to constitutional protection and such disciplinary rules were in violation of the Constitution. The Court reemphasized that its ruling did not mean that advertising by attorneys could not be regulated in any manner. The Court reinterated Virginia State Board of Pharmacy saying that false, deceptive or misleading advertising is subject to restraint.[40] "The context has little force in the commercial arena."

Bates further allowed the Court to reinforce the right of reception of commercial information: "the listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue...Advertising, though entirely commercial, may often carry information of import to significant issues of the day."[41] In addition, the Court noted: "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system...such speech serves individual and societal interests in assuring informed and reliable decision making."[42] In discussing

the "paternalistic" approach evident in blanket state suppression of advertising by attorneys (and other professionals),the Court seemingly finished merging the traditional protected speech with advertising: "The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice 'that the First Amendment makes for us'."[43]

Reliance on a broad interpretation of the First Amendment was part of the Court's development of corporate "rights" in Bellotti.[44] At issue in the case was the constitutionality of a Massachusetts criminal statue prohibiting specified banks and corporations from making contributions or expenditures for the purposes of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business, or assets of the corporation."[45] The extent of the Court's emphasis on First Amendment rights of reception is evident as the principal question in the case was redeveloped. The lower court had placed at issue "whether and to what extent corporations have First Amendment right." The Supreme Court found that the wrong question: "The First Amendment, in particular, serves significant societal interests. ...(T)he question must be whether (the section at issue) abridges expression that the First Amendment was meant to protect."[46]

After discussing at length the traditionally accepted role of political information in society, the Court wrote:..."The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'."[47]

From the current beliefs about advertising discernible from recent FTC and court actions, two very important points emerge: 1) Both the FTC and the

Supreme Court indicate that they view advertising as a potentially important source of commercial information for consumers. The flow of this information must be guaranteed and 2) Because of the nature of commercial messages, deceptive advertising has no First Amendment protection and will not be tolerated. This veiw has been articulated and developed by the Supreme Court and apparently has the full support of the FTC. However, although the granting of First Amendment status is of rather recent vintage the criteria for determining deception in commercial messages are of an earlier season. This lack of concurrent development has created many areas of ambiguity. The criteria, such as they are, evolved through numerous FTC administrative law decisions beginning with the passage of the Wheeler-Lea Amendment in 1938 and occasional court review of the Commission's decisions. Therefore, to grasp the full impact of the FTC decisions relating to deceptive advertising in the current environment of constitutionally protected nondeceptive commercial messages it is imperative to trace the development of the Commissions's criteria for determining deception. While doing this it is equally imperative that one remember the criteria developed prior to the mid 1970s were not subject to constraints imposed by constitutional protection of commercial speech. This paradox--regulation of commercial speech using criteria developed before the granting of First Amendment protection to commercial speech--accounts for much of the uncertainty and difficulty advertisers are facing now.

Since the Wheeler-Lea Amendment did not define "unfair or deceptive acts or practices" as they related to advertising and Congress did not clarify the situation by providing criteria for determining unfairness or deception, the criteria have evolved via FTC decision. The FTC has found that an advertisement need not show an actual deception to be deceptive. It is sufficient to show that it has the power or tendency to deceive.[48] Since tendency to deceive is the basis of determination of deceptive acts

or practices, the question becomes what standard of individual perception will the Commission apply in trying the facts. The Commission has interpreted the advertisement as the 'average individual,'[49] or as the 'buying public' generally would interpret it.[50] However, there also is FTC precedent for evaluating advertisements according to their probable impact upon particularly vulnerable segments or groups who might come into contact with the advertisement. "The fact that a false statement may be obviously false to those who are trained and experienced does not damage its character, nor take away its power to deceive others less experienced."[51] These segments have included the credulous, ignorant or unthinking as well as the most sophisticated readers.[52] Moreover, the advertisement is evaluated by its general impression as read as a whole,[53] and literal truth is not accepted as a defense for deception when misleading misrepresentation is found on a casual reading.[54] To further assist in creating judgmental difficulties, the Commission relies upon its own expertise in deciding whether an advertisement creates a misleading impression.[55]

Three very important points emerge from these rulings regarding deceptive practices which were handed down prior to the flurry of First Amendment activity in the 1970s. The standards of individual perception used for determining deceptive acts or practices are hazy at best. The Commission may rely entirely upon its own expertise to determine capacity to deceive and assume that an unjust advantage in the marketplace flows to the deceiver. Finally, the administrative law decisions of the Commission are not binding upon future decisions made by the Commission. Each of these points merit further treatment.

Prior to 1963, the standard of individual perception used by the Commission was well established as including the credulous, ignorant or unthinking.[56] However, in Kirchner v. FTC the Commission rendered a decision that seemed to retreat from this standard of perception.

> An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim... A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

The Commission seemed to reiterate its retreat from a standard of perception including the ignorant, credulous or unthinking in Papercraft Corporation and Coca-Cola Company.[58] However, in the later decision neither the ALJ in his initial decision nor the Commission acting in review expressly based its decision upon a new standard of perception. Indeed, the determination well may have been reached purely on the basis of fact without bringing into play any standard of perception. Yet, in both decisions there were dissenting statements expressing fear that the decision may be interpreted as meaning that the Commission was abandoning its standard model of the consumer as the ignorant, the unthinking and the credulous person. The result is as Commissioner Macintyre feared in his dissent in Papercraft.[59]

> ..should this observation (that the foolish or feeble minded segment is underserving of the Commission's protection) be construed as a retreat from our long-held position that the public as a whole is entitled to protection, including even 'the ignorant, the unthinking and the credulous', then the result may well be confusion in the Commission's activities in the deceptive practices field.

When one adds to this hazy standard of perception developed by the Commission the fact that it also decides cases upon its own experience and is not bound by prior administrative law decisions nor advertiser input, the picture is further obfuscated. Logically, a standard of perception is a matter of law and not of fact and therefore, "while informed judicial determination is dependent upon enlightment garnered from administrative experience, in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction."[60]

Yet, no such legal standard for perception has been constructed within the judicial system. Rather, the courts have been reluctant to interfere with FTC rulings. The Supreme Court has made clear that "when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision.[61] In Jacob Spiegel[62] the Supreme Court further outlined the powers of the Commission.

> ...the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the lawful practices in this area of trade and commerce...judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy...It (the Commission) has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist...Its expert opinion is entitled to great weight in the reviewing courts.

Thus, until the flurry of First Amendment activity in the area of commercial speech during the mid 1970s, the FTC had free rein to regulate advertising essentially much as it determined for itself. For all practical purposes there was virtually no court intervention. If there had been judicial intervention resulting in the construction of a legal standard of perception within the judicial system, much of the uncertainty surrounding what constitutes deceptive practices may have been removed.

Since there was not judicial construction of a standard of perception, the Commission's decisions remained the only source for determining what standard of perception would be used. But one must keep in mind that although an administrative agency must either conform to its own precedents or explain its departure from them,[63] "subject to the qualified role of stare decisis in the administrative process, they (adjudicated cases) may serve as precedents."[64] Hence, in rendering decisions the Commission is not actually bound by precedent. Any standard of perception that may be deduced from prior Commission rulings is subject to immediate change in future decisions

by the Commission. Essentially, these were the conditions in the arena of regulation of deceptive acts and practices relating to advertising through the early 1970s.

After the mid 1970s the FTC's authority to prevent 'unfair or deceptive' advertising had to accommodate the First Amendment. Therefore, the last three years (1976, 1977 and 1978) have in some respects seen a more cautious, although unyielding Commission. These years have marked a period of transition for the Commission because it has had the task of protecting the consumer while preserving the constitutional right of advertisers in the area of commercial speech.

In the area of advertising, the Commission has not eagerly ventured into many new issues. Deceptive practices have continued to be a favorite target of the Commission; however, the Commission has been much more aggressive in initiating the complaints against the deceptive practice and specifying remedies. During the past three years, the Commission has found well over 100 manufacturers distributors and their advertising agencies guilty of deceptive advertising. Accordingly, just as many cease and desist orders have been issued by the Commission. Moreover, the manner in which the Commission has chosen to deal with deception,i.e., the issues addressed in cases of allegedly deceptive advertising, have undergone changes which indicate and reinforce the Commission's view of commercial speech as an important source of consumer information.

Following the reasoning of the Supreme Court, the Commission seems to be very committed to the consumer's right to receive truthful nondeceptive advertising as a legitimate source of marketplace information. This commitment has not changed some of the commission's reasoning used to determine capacity to deceive. But the Commission's newer commitment to ensuring the free flow

of truthful nondeceptive commercial information has led to strict requirements of substantiation of claims which may be construed from an advertisement. This shift of stance is totally consistent with the Commission's commitment to an unimpeded flow of legitimate truthful commercial information. However, it continues to be frustrating to the advertiser and manufacturer because of the lack of clearly specified requirements for substantiation from the Commission.

Two FTC decisions, Simeon Management Corporation[65] and Ford Motor Company[66], handed down relatively soon after Virginia State Board of Pharmacy, are essential for one to grasp the climate within which the FTC now operates. Although the initial complaint in each of the cases was issued prior to Virginia State Board, the final order was issued after First Amendment protection was extended to commercial speech. Timing makes the opinion of the Commission a valuable source of information regarding how the Commission plans to regulate deceptive and unfair practices while being careful not to infringe upon the advertiser's constitutionally protected right of free speech.

In Simeon Management,[67] criteria that had been established by the Commission to determine deceptive practices prior to Virginia State Board of Pharmacy were reiterated.

> Capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act.[68] "Advertising capable of being interpreted in a misleading way should be construed against the advertiser. Neither actual damage to the public or actual deception need to be shown."[69]
>
> What constitutes deception in advertising is clearly within the realm of the Commission's expertise.[70] The Commission may utilize its accumulated expertise in analyzing the facts of each case to determine what direct and implied representations are contained in advertising. It may also use its expertise in evaluating what facts are material to consumers, and thereby to determine the situations in which material facts have not been disclosed.[71]

No mention of a standard of perception to be used in determining capacity to deceive was made; however, little doubt is left that the Commission intended to regulate constitutionally protected commercial speech as an

'expert body' relying upon its own interpretation of the advertisement. Obviously, from the cases cited in the Commission's opinion, it sees no inconsistency between the precedent set by these administrative law decisions (for the most part handed down prior to constitutional protection of commercial speech) and the manner in which commercial speech can be regulated after being granted First Amendment protection. This view of the Commission became clearer in Ford Motor Company.[72]

In Ford the Commission held that the meaning of an advertisement is a "question of fact that may be determined by an examination of the advertisement itself." Also, it held that consumer testimony is subject to the expert interpretation of the Commission, "Not withstanding the analysis of the surveyors, the verbatim responses of the interviewees clearly demonstrate that a great number of them equated the mileage claims with what they ("YOU") might expect to obtain. This is close enough." Further, it ruled that although an advertisement may convey more than one representation to the public, "(t)his fact... does not detract from the finding that the advertisement did in fact also make the representation (deceptive) alleged in the complaint."[73]

Although commercial speech is protected by the First Amendment, the Commission makes it clear that if in its reading of an advertisement it believes a representation in the advertisement may be construed as deceptive, that is basis for complaint. Thus the construction of deception supplants any overriding impact on the First Amendment.

The Commission made no explicit mention of a standard of perception used to determine deception. But the Commission did make it clear that a "great number" of consumers construing the advertisement in its alleged deceptive form is basic for corroborating the fact that the alleged deceptive representation was indeed present in the advertisement. It is important to note that this "great number" may not be a statistically significant number of consumers. One is left to guess whether the Commission's "great number" includes the

ignorant, the credulous and the unthinking. However, some clues to the answer may be provided by the Commission's equating the "ordinary driver: of the advertisement to the "impersonal, unknown "YOU" to whom the advertisement is necessarily directed."[74] The Commission then corroborated the existence of the deceptive claim with the "great number's" responses which showed they "equated the mileage claims with what they ("YOU") might expect to obtain." It appears that Ford Motor Co. marks the beginning of the Commission's return to its old standard of perception including the ignorant, the credulous and the unthinking. Obviously, the "impersonal, the unknown "YOU" to whom advertisements are necessarily directed contains the most ignorant as well as the most sophisticated consumers.

Ford is also an extremely important case because it is the first major FTC decision in which the constitutional protection of the commercial speech was an issue. The quest on of First Amendment protection arose under the issue of whether the respondent at the time it disseminated the challenged advertisements, had a reasonable basis for the gasoline consumption representations as stated in the complaint.

The Commission reemphasized its ruling in Pfizer, holding that, "(d)etermination of whether an advertiser possessed and relied upon a 'reasonable basis' for believing a representation to be true requires evaluation of 'both the reasonableness of an advertiser's actions and the adequacy of the evidence upon which such actions were based."[75] The basic inquiry, according to the Commission was whether the advertiser "acted upon information which would satisfy a reasonably prudent businessman" that the representation is true and that he thus acted in "good faith."[76] Further, the Commission, citing both General Dynamics and Pfizer, reemphasized that a respondent may have a reasonable basis to support its claim without having reasonable basis to support making its claims. Continuing, the Commission cited Firestone

where it was held that if it is implied that claims have been "substantiated by scientific tests and that the test relied on did not constitute a substantiating scientific test, (then) accordingly, the unsubstantiated claim was unfair and deceptive irrespective of whether the product would in fact perform as advertised."[77]

When the Commission's view of reasonable basis as specified above is juxtaposed with Ford's affirmative defenses and the Commission's handling of each of the these defenses in its decision, several extremely important points relating to the status of First Amendment protected commercial speech emerge. Ford contended that the "failure to possess a 'reasonable basis' for an advertising claim is neither unfair nor deceptive nor an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act and that such a decision is matter of Congress and outside the Commission's power."[78] The Commission rejected this defense citing legislative history surrounding the creation of the FTC and indicating that Congress "desired to create a body of experts to define unfair trade practices and thereafter to prevent those practices."[79] Moreover, the Commission maintained that it could meet the needs of the times by using its power to "define in the first instance what it considers 'unfair'. Continuing, the Commission noted that it could 'think of few practices that are more unfair' than for an advertiser to make a specific performance claim for its product without having a 'reasonable basis' for such claim."[80]

Ford also contended that the Commission's "reasonable basis" shifts the burden of proof in a Section 5 enforcement thus depriving it of due process. The Commission countered that the procedural steps of proof evolving from "reasonable basis" are like "show cause" procedures which are a part of the FTC's statutory mandate, and the Commission was "unaware of any constitutional bar to a 'show cause' procedure in administrative law.[81]

Ford's last two defenses related directly to First Amendment issues. It contended that the imposition of a "vague, ill-defined 'reasonable basis' duty creates a chilling effect" upon the dissemination of "truthful and informative advertising representations, thus impinging on First Amendment rights."[82] The Commission took this contention to its 'logical' conclusion, stating that the respondent may be arguing that it could engage in 'inherently unfair' practices because if its First Amendment privileges. The Commission held that the exception of commercial speech from absolute protection is not limited to deceptive or untrue statements, but necessarily extends to unfair trade practices.[83]

Ford's last First Amendment based defense was that the application by the Commission of the "reasonable basis doctrine to representations it (FTC) had found in the advertisement, but which Ford did not intend to make, raises serious questions of free speech and due process. The Commission pointed out that the respondent had no evidence supporting its claims. Therefore, the representation was "misleading even if the actual claim turned out to be true because of subsequent developments. There is no doubt that the Commission can require an affirmative disclosure to prohibit any misleading facet of advertising."[84] Although the Commission does say the respondent's argument may be more forceful if the implied meaning was initially imputed to the advertisement--by the Commission's expertise.

Ford Motor Co. is indeed a landmark case in FTC decisions. Several extremely important points have been pointed out from the case. Extension of First Amendment protection to commercial speech has in no way affected the Commission's 'expertise' in determining an advertisement's potential to deceive and what an advertisement may be construed to mean. Further, despite First Amendment protection of commercial speech, the Commission exhibited a strong belief that if in its expert opinion an advertisement may be construed

as being deceptive or misrepresentative, then the advertisement is automatically outside the realm of First Amendment protection.

The Commission also held that requiring substanciation as a "reasonable basis" prior to making any claim in an advertisement is not an infringement upon the First Amendment freedom of commercial speech. Also, even if advertising claims were ultimately proved true, but the advertiser had no "reasonable basis" for initially making the claims, the advertisement would be deceptive and unfair. Therefore, the advertisement would have no First Amendment protection. And, finally although the Commission requires substantiation as a "reasonable basis" for making claims, it is not bound to use consumer surveys and those surveys it does use are subject to the same 'expert' interpretation as advertisements.

The Commission's reasoning in Ford is evident in Chrysler Corporation, a decision handed down the same day. In Chrysler, the Commission held that a respondent's lack of intent to deceive is not a defense, further adding that if unintentional deception does occur it is no defense to say that other non-deceptive advertisements which are part of the same advertising campaign will correct the deception.[85] The Commission also drew a distinction between types of products and the nature of substantiation required for claims. The respondent argued that a low percentage of persons would have seen the challenged advertisement, fitting its case under the rationale of the "Dry-Ban" case where only two to four percent of the viewers would have construed the advertisement in the allegedly deceptive manner.[86] However, the Commission distinguished the respondent's case from that of Ban-Dry by pointing out that Ban-Dry was a relatively inexpensive item and the consumer, "without much investment could make up his or her own mind" about whether it was as represented. But an "automobile is an altogether different category," and while the performance of an antiperspirant may be evaluated by one's

subjective preference, "comparative gasoline claims...are of critical importance to the prospective purchaser as a frame of reference of where to shop."[87]

Many of the areas addressed by the Commission in Ford and Chrysler were quickly reinforced and expanded upon in following FTC decisions. The Commission has consistently insisted that advertisers have substantiation as a reasonable basis for claims at the time they are made and that the substantiation be for the claim imputed to the advertisement by the Commission.[88] This requirement extends to advertising agencies who are now liable for false and deceptive claims[89] and to celebrities who may endorse products.[90]

Although the Commission has held that "the type of substantiation required to satisfy the reasonable basis standard would depend on the facts of each case,"[91] it has specified criteria. Among such criteria:

> "an opinion in writing signed by a person qualified by education and experience to render such an opinion...that a competent and reliable scientific test or tests of other objective data exist to substantiate such representations."[92]
>
> "a statistically valid sample of those persons who have either purchased" or worked with the product."[93]
>
> "supported and substantiated by competent scientific data or tests" which must be written and available to the Commission while the claims are being made and for at least three years following the final use of the representation.[94]
>
> Further, in the case of representations concerning the safety of automobile tires, the criteria specified include tests for the "following (a) stopping; (b) cornering; (c) puncture protection; and (d) high speed performance."[95]

In the case of advertising agency liability, the FTC has been more explicit in spelling out how the agency may avoid liability through the reasonable basis standard. The FTC issued a complaint against Sears for making deceptive and unsubstantiated claims about its Lady Kenmore diswashers. In the proposed order accompanying the complaint, the Commission set out the standard under which the advertising agency could escape liability for

violations of the order. The agency prior to placing ads should: present to the client all reasonable interpretations of the advertisements. Additionally the agency should request from the client any test, experiment, demonstration or survey conducted by or in possession of the client which tend to support or disprove each interpretation. Also, the agency should neither know nor have reasons to know that the representations were false or that there was no reasonable basis for making the representations. All relevant documentation should be retained for a period of three years.[96]

True to its commitment to the unimpeded flow of nondeceptive and truthful information to consumers, the FTC has been quick to resort to affirmative disclosure and corrective advertising to dispel any unjust advantage that may be assumed to have accrued to the dishonest or deceptive advertiser.[97] Moreover, the Supreme Court's refusal to hear Warner-Lambert has temporarily removed any doubt that corrective advertising as specified by the Commission is viewed as a constitutionally legitimate remedy.[98] Subsequently, the Commission has required corrective notices in specified media and costing a specified amount of money;[99] required affirmative disclosures which would account for a certain percent of total advertising;[100] and required the inclusion of specific information designed to correct msirepresentations or deceptions construed from the original advertisements.[101]

One of the most recent corrective advertising decisions handed down by the Commission would require American Home Products to spend approximately $24 million in future advertising containing the disclaimer, "Anacin is not a tension reliever."[102] Administrative law judge, Montgomery Hyum, in his initial decision stated that since consumers perceive tension relief as an important attribute to Anacin, it is reasonable to conclude that the tension relief image is likely to persist for some time to come in the absence of a corrective message.

The Commission's insistence upon stopping deceptive representations in advertisements and eliminating any unfair advantage which may accrue to advertisers who have used deceptive or misrepresentative claims is obvious. Yet, even the obvious was underscored when the Commission recently sought clearance for a survey to be sent to 14,000 households to determine the impact of corrective advertising for Listerine. These surveys will inquire into consumer's beliefs and usage patterns of several brands of mouthwash and will be used to help the Commission in rendering further decisions. This incidentally is the first such study concerning the effectiveness of Commission remedies.

Although the Commission's initial decision in National Council on Egg Nutrition (NCEN) was handed down prior to American Home Products, there is probably no more recent case that illustrates the Commission's willingness to impose corrective advertising remedies and simultaneously reveals the Commission's view of commercial speech relative to First Amendment protection. Moreover, the major portion of the Commission's initial decision was upheld upon review.[103]

NCEN, a trade association of members of the egg industry, claimed in numerous advertisements and through a variation of wording that there is no scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease and that statements to the contrary are a misinterpretation of scientific evidence. These claims were found to be misleading and deceptive by the FTC.

The FTC pointed out that it was not its intention to determine the "scientific facts," but rather it is the "Commission's statutory duty to ensure that commercial advertisements intended to convince the public of the safety of a product are not deceptive, and...that oversimplified expressions of opinion are not taken out of context and presented as fact in order to misrepresent the nature of a complex scientific issue...and thereby promote misleadingly the consumption of eggs."[104]

The Commission, noting the "more than one meaning" rule,[105] found that the advertiser's phrase "there is no evidence" could be interpreted reasonably as there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that eating eggs increases the risk of heart disease. NCEN was ordered to cease making the claim that "There is (overwhelming) evidence that eating eggs does not increase the risk of heart disease" and other unsubstantiated claims. Moreover, NCEN was required by the Commission upon rehearing to "indicate clearly and conspicuously in their advertising that the claim they seek to make for eggs is subject to substantial disagreement by qualified experts within the scientific community."[106] (The Commission's original order had read, "there is evidence that eating eggs may increase the risk of heart disease."[107])

The last area of affirmative disclosure in the Commission's decision regarded the name of the trade association. The ALJ concluded that the association's name had the tendency and capacity to mislead the public into believing that the corporation was an impartial, independent, quasi-governmental health commission, when in fact it was an association of the persons engaged in the egg industry. Upon review the Commission pointed out that while excision of a misleading corporate or trade name is at times an appropriate remedy,[108] it believed "that the clarifying disclosure proposed by the ALJ is an entirely suitable and less drastic means of curing the deception here."[109]

Coupled with the affirmative disclosure tests in NCEN is one of the most specific First Amendment/commercial speech tests to date. Concerning the statement that "there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease," NCEN argued: that the statement is true; that even if it was misleading, the FTC's prohibition infringes upon its First Amendment rights and that even if the FTC's holding of a violation were upheld, on appeal, its order is unconstitutionally vague and overbroad.

NCEN argued that the principles established in Virginia State Board of Pharmacy prohibit the agency from considering the content of the statement without reference to the state of mind with which it was uttered. The court, citing Virginia Pharmacy, indicated that the First Amendment did not interfere with a state's dealing with problems of deceptive or misleading commerical speech even when it is not provably false, or even wholly false. Also, the court cited Bigelow v. Virginia making it clear that protection of speech of any sort is to be determined by assessing the First Amendment interest at stake against the public interest allegedly served by regulation. Moreover, the court continued, First Amendment interest is two fold, embracing both the interest of speaker and audience, which in the case of commercial speech consists of consumers. The consumers' interest, according to the court, is 'n obtaining information on which to base the decision of whether to buy.[110] Further, the consumers' interest is served by ensuring that the information is not false or deceptive, and, in fact, coincides with the public interest served by the regulation.

NCEN also argued that its advertisements did not fit the paradigm of commercial speech which the Court had in mind in Virginia Pharmacy, "speech that does no more than propose a commercial transaction,"[111] but were expressions of opinion on an important and controversial public issue. Hence, its commercial misrepresentation on a controversial public issue should be treated in the same manner as a libel of a public figure.[112] The court held that the statements were not made as opinion but as fact. It held the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates. Moreover, the court interpreted the "Supreme Court's expressions on the subject of commercial speech" as not being limited to the mere proposition of a particular commercial transaction. Rather, the

expressions extend to false claims such as those asserted for the purpose of persuading members of the reading public to buy the product because of its alleged harmlessness. Hence, the initial FTC order did not offend the First Amendment.

Concerning NCEN's complaint that the FTC's order was overly broad and vague, the court failed to so find.[113] In National Lead the court pointed out that the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the Act, the respondents should expect "some fencing in." Turning to the defense that the FTC's order was too broad, the court carefully pointed out that a remedy may be no broader than that which is necessary to prevent deception[114] or to correct the effects of past deception.[115] Then, the court reasoned that there was no long record of deception in the case of NCEN as there had been with Warner-Lambert. Therefore, there was no evidence that the claim was believed by consumers after the false advertising had ceased. The court "is concerned primarily with preventing future deception," thus it limited the application of disclosure. Language indicating that the claim NCEN makes for eggs is subject to substantial disagreement by qualified experts within the scientific community, must appear only when NCEN chooses to make a representation as to the state of available evidence or information concerning the controversy. To require the disclosure in all advertisements by NCEN would require NCEN, according to the court, to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position.

The role and status of commercial speech and hence advertising in the 1970s have undergone tremendous change. In order for the advertiser and producer to function effectively in the marketplace that change must be understood. However, it is a great leap from recognizing that advertising's role

and status have changed to an actual understanding of that change. If one insists that this understanding be detailed and certain enough to irrefutably predict the future legal environment of advertising, there will be no understanding. Yet, one can derive many indications of what can logically be expected in the future by looking at the role advertising has played and the status it has been accorded up to this time. Some of the major indications will be recapitulated here; however, the specific cases from which the indicators emerge will not be cited again, since they have been discussed at length.

At present there is a very strong position held by the judicial system and supported by the Commission that commercial speech merits First Amendment protection. This is totally consistent with the view that the consumer should have available a marketplace of ideas to aid him in deciding whether to buy or not. Any impediment to the free flow of truthful, nondeceptive commercial information will not be tolerated. However, absolutely no protection under the First Amendment will be extended to advertising which may be construed in a deceptive or misleading manner. Both the courts and the Commission have made this point abundantly clear.

The major difficulty with the Commission's stance favoring the free flow of commercial information is ascertaining what will be considered deceptive or misleading. At present no set standard of perception exists, but the Commission insists upon prior substantiation as a reasonable basis both for making and then substantiating the claims made. The major certainty in this area is that the Commission will continue to rely upon its own expertise in deciding as a point of fact whether the potential to mislead or to deceive exists. Whether the Commission's requirements for prior substantiation would withstand a major court test of prior restraint or whether it would be found

in violation of the First Amendment privilege extended to commercial speech remains to be seen. However, it appears that the courts are not overly eager to enter this realm of Commission activities.

A very new development is the Commission's plan to conduct consumer surveys in order to evaluate the effectiveness of Warner-Lambert's corrective advertising and to help it in making future decisions. What role this type of Commission research will pay in the future is also uncertain. However, one can probably deduce from the Commission's own involvement and the increasing number of instances in which the Commission has called for empirically verifiable substantiation based upon adequate samples and done by qualified scientists that solid research may become the advertiser's best defense as well as only acceptable form of substantiation.

The future? Despite the numerous indications mentioned throughout this paper, there is little certainty. The First Amendment/commercial speech interface has not been subjected to rigorous judicial examination. Advertisers must still contend with seemingly impossible substantiation problems. Indeed, as indicated in Figure I at the beginning of the paper, the risk of failure in the marketplace is great. Further, the costs of reducing that risk is increasing as the FTC requires more sophisticated substantiation. However, there is one certainty from which there is no escape--the Federal Trade Commission as policeman of "deceptive and unfair practices" is committed to establishing a marketplace where consumers can accept any advertisement without fear of being misled or deceived.

Endnotes

[1]Federal Trade Commission TRR # 716.

[2]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (421 U.S. 809 (1975).

[3]Bates v. State Bar of Arizona (975 Ct. 2691 (1977) cited here as 2 Med. L. Rptr. 2097).

[4]Federal Trade Commission TRR # 745.

[5]Arlene Rosenblum, "Are You Paying 300 Percent too Much for Your Glasses?" Good Housekeeping (February 1978): 225-226.

[6]Valentine v. Chrestensen 316 U.S. 52 (1941).

[7]Id. at pp. 54.

[8]F.T.C. v. Sterling Drug, Inc., 317 F.2d 669 (1963): also see F.T.C. v. Proctor and Gamble Co., 387 U.S. 568 (1967).

[9]New York Times v. Sullivan 376 U.S. 254, cited here as 1 Med. L. Rptr. 1527.

[10]Id. at 1532.

[11]Id.

[12]Lee v. Board of Regents 441 F.2d 1257.

[13]Id. at 1258.

[14]Tinker v. Des Moines, etc. v. School District 393 U.S. 503.

[15]Pittsburg Press Co. v. Pittsburg Committee on Human Relations (1973, 413 U.S. 376, 37 L. Ed. 2d 669, 935 Ct. 25531).

[16]Bigelow v. Va., (421 U.S. 809, 44 L. Ed. 2d 600, 955 Ct. 222) further cited as 1 Med. L. Rptr. 1919.

[17]Virginia State Board Supra.

[18]First National Bank of Boston v. Bellotti, cited here as 3 Med. L. Rptr. 2105.

[19]Bigelow v. Virginia, at 1922.

[20]Id. at 1923. See also Murdock v. Pennsylvania, 319 U.S. 105, 110-111.

[21]Id. See also New York Times and Smith v. California, 361 U.S. 147, 150.

[22]Id. See also Thomas v. Collins, 323 U.S. 516, 531.

[23]Id. See also Ginzburg v. United States, 383 U.S. 463, 474.

[24]Id. at 1925.

[25]Id.

[26]Virginia State Board of Pharmacy, Supra.

[27]Id. at 756-757.

[28]Id.

[29]Id.

[30]Id. at 758.

[31]Id. at 770

[32]Id. at 771

[33]Id.

[34]Id. at 765.

[35]Id. at 772.

[36]Carey v. Populations Services cited here as 2 Med. L. Rptr. 1935 (June 9, 1977).

[37]Id. at 1944.

[38]Id.

[39]Bates.

[40]Id. at 2111.

[41]Id. at 2102.

[42]Id.

[43]Id. at 2103, see also Virginia Board and Linmark Associates, Inc. v. Willingboro.

[44]First National Bank.

[45]Id.

[46]Id. at 2109

[47]Id. at 2112.

[48]Thiney v. F.T.C., 512 F 2d 176, 180 (10th Cir. 1975); Spiegel v. F.T.C., 494 F. 2d 59, 63 (7th Cir.), cert denied, 419 U.S. 896 (1974); Regina Corp. v. F.T.C., 322 F. 2d 765, 768 (3rd Cir. 1963): Goodman v. F.T.C., 244 F. 2d 584, 595 (9th Cir. 1957); Deer v. F.T.C., 152 F. 2d 65, 66 (2d Cir. 1945).

[49]Korber Hats, Inc. v. F.T.C. 311 F. 2d 358, 360-62 (1st Cir., 1962); Ward Laboratories, Inc. v. F.T.C., 276 F. 2d 952, 954 (2d Cir. 1960), cert. denied, 364 U.S. 827 (1961).

[50]Kalwajtys v. F.T.C., 237 F. 2d 654, 656 (7th Cir. 1956).

[51]Standard Education Society v. F.T.C. 302 U.S. 112, 58 S.Ct. 113, 82 L. Ed. 141 (Black, J.) rehearing denied 802 U.S. 779 (1937), motion denied 302 U.S. 661 (1938).

[52]Aronberg v. F.T.C. 132 F. 2d 165, 167 (7th Cir. 1941); General Motors Corp. v. F.T.C., 114 F.2d 33, 36 (2d Cir. 1940), cert. denied, 112 U.S. 682 (1941); Exposition Press, Inc. v. F.T.C., 295 F. 2d 869, 872 (2d Cir. 1961); Bantam Books, Inc. v. F.T.C., 275 F. 2d 680 (2d Cir.), cert. denied 364 U.S. 819 (1960); Charles of the Ritz Distributors Corp. v. F.T.C., 143 F. 2d 676 (2d Cir. 1944); Coca-Cola Co. v. F.T.C. Dkt. # 8839.

[53]J.B. Williams Co. v. F.T.C., 381 F. 2d 884, 889 (6th Cir. 1967); Continental Wax Corp. v. F.T.C., 330 F 2d 475, 477 (2d Cir. 1964).

[54]J.B. Williams Co. supra; Lorillord Co. v. F.T.C., 186 F. 2d 52, 59 (6th Cir., 1950); Korber Hats, Inc. v. F.T.C. supra.

[55]Zenith Radio Corp. v. F.T.C., 143 F. 2d 29 (7th Cir. 1944).

[56]Kirchner v. F.T.C. (63 F.T.C.) 1281 (1963), aff'd sub nom. Kirchner v. F.T.C., 337 F. 2d 751 (9th Cir. 1964), at pp. 1289-1290.

[57]Papercraft Corporation v. F.T.C. (63 F.T.C. 1965, 1993 (1963)).

[58]Coca-Cola Co. v. F.T.C. supra.

[59]Papercraft Corporation v. F.T.C. supra at 1997.

[60]F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L. Ed. 2d 904 (1965) Chief Justice Warren at 392.

[61]F.T.C. v. Colgate-Palmolive Co., supra at 392.

[62]Jacob Spiegel Co. v. F.T.C., 327 U.S. 608, 611-614 (1946).

[63]F.T.C. v. Crowther, 430 F. 2d 510, 514-516 (D.C. 1970).

[64]NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766, 89 S.Ct. 1426, 22 L. Ed. 2d 709 (Fortas, J., 1969).

[65]Simeon Management Corporation et al v. F.T.C. Dkt. 8996 (April, 1976).

[66]Ford Motor Company, F.T.C. Dkt. # 9001 (April 13, 1976).

[67]Simeon Management Corporation et al, supra at 1229-1230.

[68]For example see Goodman v. F.T.C., 244 F. 2d 584 (9th Cir. 1957).

[69]Resort Car Rental System, Inc. v. F.T.C., 518 F. 2d 962, 964 (9th Cir. 1975).

[70]Fedders Corp. v. F.T.C., 529 F. 2d 1398, No. 75-4051 (2d Cir., Jan. 21, 1976).

[71]Simeon Management v. F.T.C. supra at 1229-1230.

[72]Ford Motor Co. v. F.T.C. supra at 778. Also see: Carter Products Inc. v. F.T.C., 323 F. 2d 523 (5th Cir. 1963); J.B. Williams Co., Inc. v. F.T.C. supra.

[73]Ford Motor Co. v. F.T.C. supra at 779.

[74]Ford Motor Co. v. F.T.C. supra at 778.

[75]Pfizer, Inc., 81 F.T.C. 23 (1972) at 64. also Ford Motor Co., supra at p. 755.

[76]Ford Motor Co., v. F.T.C. supra at 755. Also see General Dynamics Corp., 82 F.T.C. at 553, 557.

[77]Firestone Tire & Rubber Co. v. F.T.C., 481 F. 2d 246, 251 (6th Cir. 1973), cert. denied, 414 U.S. 1112).

[78]Ford Motor Co. supra at 781.

[79]Ford Motor Co. supra at 781.

[80]Ford Motor Co. supra at 781.

[81]Ford Motor Co. supra at 782.

[82]Ford Motor Co. supra at 782.

[83]Ford Motor Co. supra 783.

[84]Ford Motor Co. supra at 783.

[85]Chrysler Corp. F.T.C. Dkt. # 8995 (April 13, 1976).

[86]Bristol-Myers Company, et al, Dkt. # 8897 (April 22, 1975).

[87]Chrysler Corp. supra at 740.

[88]Block Drug Company, Inc., et al, Dkt. # 9050 (Dec. 21, 1977).

[89]STP Corp. et al F.T.C. Dkt. # C-2111 87 F.T.C. (Jan. 6, 1976).

Advertising Inc. F.T.C. Dkt. # C-2778 87 F.T.C. (Jan. 12, 1976); Porter & Dietsch, Inc., et al, F.T.C. Dkt. # 9047 90 F.T.C. (Dec. 21, 1977).

[90]Karr Products F.T.C. Dkt. # 9109 (May 10, 1978).

[91]Porter & Dietsch, Inc. supra.

[92]STP Corp. et al supra.

[93]Lindal Cedar Homes, Inc., F.T.C. Dkt. C-2774 (Jan. 5, 1976).

[94]Astor-Scott, Inc., et al F.T.C. Dkt. C-2893 (June 13, 1977).

[95]Parker Advertising Inc. supra.

[96]Sears Roebuck and Co., et al F.T.C. Dkt. 9104 (November, 1977).

[97]Nagle, Spillman & Bergman, Inc. F.T.C. Dkt. C-2834 (Aug. 18, 1976); Frankart Distributors, Inc., et al F.T.C. Dkt. C-2904 (Oct. 13, 1977); and LaFayette United Corporations, et al F.T.C.Dkt. # 8963 (Oct. 26, 1976).

[98]Warner-Lambert v. F.T.C., 562 F 2d 749, 760 (D.C. Cir., 1977).

[99]STP Corp. et al, supra.

[100]Hair Replacement Centers of Boston, Inc. et al F.T.C. Dkt. C-2819 (May 17, 1976).

[101]Nagle, Spillman & Bergman, Inc. supra; Frankart Distributors, Inc., et al supra ; LaFayette United Corporations, et al supra; and Everseal Waterproofing Corporation, et al, F.T.C. Dkt C-2865 (Feb. 4, 1977).

[102]American Home Products v. F.T.C. 436 F. Supp. 785.

[103]National Commission on Egg Nutrition v. F.T.C. 570 F. 2d 157 (7th Cir. 1978).

[104]National Commission on Egg Nutrition supra at 193.

[105]Murray Space Shoe Corp. v. F.T.C. 304 F. 2d 270, 272 (2d Cir. 1963); Rhodes Pharmacal Co. v. F.T.C., 208 F 2d 383, 387 (7th Cir. 1953). Also see Ford Motor Co. supra and Chrysler Corp. supra.

[106]National Commission on Egg Nutrition supra at 193.

[107]National Commission on Egg Nutrition F.T.C. Dkt. 8987 at 194.

[108]For example see: United States Naval Weekly, Inc. v. F.T.C., 207 F 2d 17 (D.C. Cir. 1953) and Navy Trading Co., 88 F 2d 776 (D.C. Cir. 1937).

[109]National Commission on Egg Nutrition F.T.C. Dkt 8987, supra at 190.

[110]Linmark Associates, Inc. v. Township of Willingboro 431 U.S. 85, 97 S.Ct. 1614, 1618, 52 L.Ed. 2d 155 (1977).

[111]Virginia State Board of Pharmacy supra at 771.

[112]See New York Times Co. v. Sullivan, supra.

[113]National Lead Co., v. Federal Trade Commission, 352 U.S. 419, 431 (77 S.Ct. 502, 1 L. Ed. 2d 438).

[114]Beneficial Corp. v. F.T.C. 542 F 2d 611, 617 (1976), cert. denied, 431 U.S. 983, 97 S. Ct. 1679, 52 L. Ed. 2d 377 (1977).

[115]Warner-Lambert supra.